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## **The Role of Standards of Review in Labour Law: David Cabrelli\***

**Abstract**-*Employment rights may be expressed as (i) rules or (ii) standards (of review). This paper probes the special role of standards of review in addressing the internal vulnerabilities to which employees are exposed in their individual employment relationship. The principal argument is made that the inherent properties of standards of review of managerial behaviour are such that they are better suited, and lend themselves more, to the policing of employment-relationship specific failures, than fixed rules: as such, standards do much more than regulate the labour market generally. The central claim made in this paper is designed as a rejoinder to the influential descriptive and normative propositions that labour laws are, or ought only to be, concerned with ensuring the maintenance of a properly functioning and efficient labour market, and that any labour laws that go beyond this market-correcting role are misconceived and unwarranted.*

**Keywords:** Labour Law – Employment Law – Employment Rights – Labour Rights – Standards – Rules – Standards of Review - Proportionality – Range of Reasonable Responses – Good Faith – Rationality Review – Intensities of Scrutiny

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## ***1. Introduction***

Scholars have argued that not all labour laws can be reduced to, or explained exclusively in terms of, the correction of systematic failures in the labour market.<sup>1</sup> Instead, they suggest that labour laws also regulate the vulnerabilities experienced by individual employees in their particular employment relationships on a case-by-case basis. This claim is used as a springboard to conduct further research into the differing standards of review that exist in labour law.<sup>2</sup> More pertinently, this article probes whether (and if so, how) the standards of review in labour law play any role in addressing the internal vulnerabilities to which employees are (i) exposed in their specific employment relationship and (ii) subjected as a result of managerial practices or particular factual contexts. The principal argument advanced in this piece is that employment rights crafted as standards of review of managerial behaviour can be conceived of from a theoretical perspective as useful devices with inherent properties that are more, and better, suited, inclined or likely to police employment relationship-specific vulnerabilities than rigid and fixed rules: as such, standards do much more than regulate the labour market generally. This is in contrast to employment rights drawn up as rigid rules which it will be argued can be conceptualised in the abstract as norms that are less well-suited to such a task, and whose optimal regulatory impact will generally be restricted to correcting general labour market failures. By adjusting their inbuilt intensity of review of managerial

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<sup>1</sup> Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 51-52 and Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33(3) *IJCLIR* 365.

<sup>2</sup> David Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 *ILJ* 146, David Cabrelli, 'Rules and Standards in the Workplace: A Perspective from the field of Labour Law' (2011) 31(1) *LS* 21, and Davidov, *A Purposive Approach* (n 1) 163-196.

conduct and decision-making according to the requirements of the particular case, as a regulatory instrument, standards of review are more sensitive to the particularities and dynamics of diverse individual employment relationships.

The theoretical claims made in this paper concerning the distinct regulatory functions that can be ascribed to rules and standards of labour law clearly have practical ramifications. As such, one might expect this article to adopt an empirical methodological approach to test their validity in terms of how they are experienced by individual employees. However, that is not the purpose of the paper. Instead, the paper presents the case for the claim that (i) rules and standards stand as regulatory techniques that are conceptually in opposition to each other and (ii) by dissecting the features and attributes of rules and standards of review in the abstract and theoretically, we can draw the premise that their objectives and effects are also likely to be distinct. As such, it is suggested that it is useful to explore both types of legal command jurisprudentially and theoretically. In doing so, the paper makes no claim to the superiority of legal-theoretical or doctrinal enquiries over empirical forms of examination as to how such standards operate in practice.<sup>3</sup> Instead, it asks a question, namely can a case be made for the proposition that the inherent properties of rules and standards diverge to such an extent that their objectives and impacts are likely to differ? And it is suggested that a combination of legal-doctrinal and theoretical tools are well-suited to providing a response to this question. Further, this is not to argue that standards of review are best understood if they are examined outside their context and practical operation to such a degree that their

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<sup>3</sup> See the discussion in Alan Bogg, 'Labour, Love, and Futility: Philosophical Perspectives on Labour Law' (2017) 33 *IJCLIR* 7, 30-33 on the 'militant' ideology that prioritises the application of certain methodological approaches over others in labour law.

real-world effects on workplace practices and behaviours ought to be ignored. But rather that the reason for framing the analysis in terms of a theoretical methodological approach is simply to point out the internal attributes of rules and standards of review and how they are naturally oriented as to have a tendency to lead towards the achievement of certain results. To that extent, if the arguments presented at various points in the discussion give the impression that particular empirical claims, assumptions, or inferences are being made about the *actual* function or impact of labour laws in practice, that is not the intention.<sup>4</sup>

The aforementioned insights about the relative suitability of rules and standards for certain roles enable us to make certain knowledge claims from a jurisprudential perspective. Their significance is fourfold. The first lies in the light they can shed on the desirability and utility of proposing *universal* justifications for labour law. Such justifications stress the importance of labour law's role in securing broader economic or public policy aims, such as the economic objective of efficient labour markets, or legitimacy in the eyes of the public. Secondly, the analysis suggests that in theoretical terms, there may be mileage in advancing more selective goals for labour law regulation, which will entail standards of review policing the employment relationship in favour of a particular group's interests, e.g. in a worker-friendly direction.<sup>5</sup> Thirdly, they cast doubt on the purchase of concerns raised in the

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<sup>4</sup> For examples of research probing the practical impact of labour laws on employees who decide to litigate, see Lizzie Barmes, *Bullying and Behavioural Conflict at Work* (OUP 2016) and Lizzie Barmes, 'Common Law Confusion and Empirical Research in Labour Law' in Alan Bogg, Cathryn Costello, Anne CL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 114.

<sup>5</sup> Alternatively, the process may work to the benefit of the employer.

academic literature about divergent intensities of scrutiny associated with each of the standards of review in labour law.<sup>6</sup> Finally, the link drawn between the standards of review and the specific contracting parties' labour relationship suggests the recognition of a model of labour law that incorporates a degree of scope for the inclusion of outcomes which treat certain workers preferentially over others in particular contexts.

Having set out in this introduction the skeleton of the argument presented in this paper, section 2 sets the scene by distilling the distinction between rules and standards generally and the diverse effects of drawing up employment rights as one or the other. Section 3 goes on to explore standards of review in labour law in greater detail by identifying and contrasting them in terms of the intensity of judicial scrutiny which they bring to bear over managerial behaviour and decision-making. Section 4 turns to the distinction between general labour market failures on the one hand and on the other, the internal vulnerabilities and imperfections that are particular to an employee in the context of a specific employment relationship. In section 5, the juridical techniques adopted to regulate systematic failures in labour markets are assessed and contrasted with the approaches adopted to police internal employment vulnerabilities, whilst section 6 turns to consider the centrality of this insight for labour law generally. Section 7 concludes.

## ***2. Rules and Standards***

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<sup>6</sup> Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (n 2), Davidov (n 1) 163-164 and Barmes (n 4) chs 5, 6 and 7.

Legal commands may be articulated as rules or standards.<sup>7</sup> As noted by Diver,<sup>8</sup> where a legal command is expressed as a rule, it is characterised by precision of application,<sup>9</sup> transparency and accessibility. But from a negative perspective, it is more capable of evasion. For example, consider the statutory commands laid down in regulations 13 and 13A of the Working Time Regulations 1998 ('WTR')<sup>10</sup> which enjoin an employer to provide an employee with twenty-eight days' holidays in each leave year. Consider also the direction in regulation 4(1) of the WTR prohibiting workers from working in excess of 48 hours in any weekly period. Likewise, we can invoke the rule prescribed by section 1 of the National Minimum Wage Act 1999<sup>11</sup> that all workers of 25 years of age or over are entitled to be paid the National Living Wage at a set hourly rate. In the same vein, we can invoke the common law unrestricted reasonable notice rule which permits any employer to terminate an employment contract on providing

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<sup>7</sup> HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn Clarendon Press 1994) 131-134; Henry M Hart Jr and Albert Sacks, *The Legal Process* (Based on Tentative Edition of 1958 New York 1994) 139-141.

<sup>8</sup> Colin S Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale LJ 65, 67. See also Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke LJ 557, 561.

<sup>9</sup> It is recognised that there will be a 'penumbra' of uncertainty of application at the margins or edges of any legal command, i.e. even in the case of a rule, e.g. HLA Hart's famous example of 'no vehicles in the park': Hart (n 7) 125-27. However, this does not detract from the main point that rules are generally more certain than standards of review in terms of their expression.

<sup>10</sup> SI 1998/1833.

<sup>11</sup> See also the National Minimum Wage Regulations 2015, SI 2015/621, reg 4.

the employee with a reasonable period of notice (subject to the statutory minimum).<sup>12</sup> These rules are fundamentally concerned with the symmetrical treatment of workers, i.e. parity.

Rules can be contrasted with juridical directions expressed as standards of review - which signpost expectations about managerial behaviour in an open-textured manner and amount to a less compelling form of normativity. Standards 'are *optimization requirements* requiring something to be realized to the greatest extent under legal and factual possibilities [and their] form of application is balancing'.<sup>13</sup> A primary example of a standard of review is the proportionality measure applicable in indirect sex discrimination law.<sup>14</sup> This standard proscribes employers from disproportionately applying a provision, criterion or practice

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<sup>12</sup> See the Employment Rights Act 1996 (ERA) s. 86. However, the unrestricted reasonable notice rule is probably best understood as giving rise to a strong presumption that a reasonable notice term will be implied into an indefinite contract, rather than as an absolute rule. It is subject to the following: (1) where a contract is for a fixed term with no notice term (express or implied), the common law will not allow termination on the giving of reasonable notice; and (2) the statutory minimum notice periods only address minimum notice provisions. As such, they do not insert a notice provision into a contract that does not contain such a clause. In other words, statutory minimum notice periods only mean that if there is an express or implied notice term, the notice given must abide by the statutory minima.

<sup>13</sup> Pedro Moniz Lopes, 'The Syntax of Principles: Genericity as a Logical Distinction between Rules and Principles' (2017) 30(4) Ratio Juris 471, 473. See also Robert Alexy, 'On the Structure of Legal Principles' (2000) 13(3) Ratio Juris 294, 300ff and H. Collins, *Regulating Contracts* (OUP 1999) 266-268.

<sup>14</sup> Equality Act 2010 s. 19(2)(d).



(‘PCP’) to achieve a legitimate aim where it puts women and a female claimant employee specifically at a particular disadvantage in comparison with men. Standards of review share the attribute of harbouring the potential to elicit different results on their application from one employee to the next and from one employer to the next: when a court or tribunal reviews the decision of an employer in accordance with the proportionality standard of review, the legal outcome in a case may vary from one employee to another.<sup>15</sup>

A point of no little importance is that standards and rules can be conceived of as legal commands that are capable of being plotted along a spectrum with certainty/determinacy (of outcome of application) and accessibility at one end of the axis and flexibility, adaptability and discretion at the other. In this way, they are best thought of as conceptual opposites, and we should not pretend that a neat and clear division between them is always possible in

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<sup>15</sup> For evidence in favour of this proposition, see Yuval Feldman, Amos Schurr and Doron Teichman, ‘Anchoring Legal Standards’ (2016) 13(2) *Journal of Empirical Legal Studies* 298, 306; Richard Craswell & John E Calfee, ‘Deterrence and Uncertain Legal Standards’ (1986) 2 *JL Econ & Org* 279, 279-280; Gunther Teubner and Oren Perez, ‘The Institutionalisation of Inconsistency: From Fluid Concepts to Random Walk’ in Gunther Teubner and Oren Perez (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing 2006) 119; Lauren B Edelman, ‘Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law’ (1992) 97 *American Journal of Sociology* 1531, 1554-1569; Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing 2005) 28; Cass R Sunstein, ‘Assessing Punitive Damages’ (1998) 107 *Yale LJ* 2071, 2109.

practical terms.<sup>16</sup> Further, the form that a particular legal direction takes can be modified by adjustment and the content of a rule can be filleted to such an extent that the legal command loses the texture of a rule and is transformed into a standard. By the same token, a standard may also be converted into a rule by a measure of fine-tuning. For example, a variation on the theme of Regulations 13 and 13A of the WTR could be taken by expressing matters in terms of a standard. This might entail a legal command that all employers must ensure that their employees take a 'rational', 'reasonable', 'appropriate' or 'proportionate'<sup>17</sup> amount of leave in any successive annual period. Where the legal command is conveyed as a standard, it is thus less precise in nature in comparison with the rule amounting to a tangible and quantifiable differential in formal and substantive terms.<sup>18</sup> Standards confer discretion on courts to adjudicate on the depth and breadth of their content over a period of time. Seen from this perspective, where an employment right is crafted as a standard, the exact nature of its content is deferred to a court to adjudicate upon at a later date.

Various theorists have explored the demerits and merits of standards of review in the abstract, such as Schauer, Scalia, Guttel & Harel and Feldman et al. The main weaknesses are claimed to be their indeterminacy and lack of predictability,<sup>19</sup> the extent to which they

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<sup>16</sup> For example, rules can include implicit or explicit consideration of what should be accounted for in determining whether a decision or conduct is 'reasonable' or 'proportionate'.

<sup>17</sup> These are examples of textbook standard-like language: Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685, 1688.

<sup>18</sup> See Collins (n 13) 268-271.

<sup>19</sup> Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991) 100-165; Antonin Scalia, 'The Rule

channel adjudicators towards the application of personal self-serving biases,<sup>20</sup> or expect them to take on the role of an economist or sociologist,<sup>21</sup> as well as the illegitimate significance afforded to irrelevant 'anchors' in the adjudication of standards of review, which all too often leads them to function erratically.<sup>22</sup> As for the virtues of standards of review, in light of the inability of Parliament to foresee all conceivable future circumstances, Sunstein points towards their indispensable role in ensuring that the most appropriate result is reached in every case that comes before an adjudicator.<sup>23</sup> In a similar vein, Braithwaite and Collins cite their utility in securing certainty in legal outcomes in the face of complex and evolving economic or social phenomena.<sup>24</sup> Meanwhile, Davidov has also provided a helpful summary of the function of standards of review, which he cites as their main strength. He perceives

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of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175. For a powerful rebuttal, see Collins (n 13) 268-271.

<sup>20</sup> Ehud Guttel & Alon Harel, 'Uncertainty Revisited: Legal Prediction and Legal Postdiction' (2008) 107 Mich L Rev 467, 479-486

<sup>21</sup> See Jonathan Morgan, *Contract Law Minimalism* (CUP 2013) 166-168.

<sup>22</sup> Feldman, Schurr and Teichman, 'Anchoring Legal Standards' (n 15) 322; and Yuval Feldman and Alon Harel, 'Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standards Dilemma' (2008) 4 Review of Law & Economics 81, 105-106.

<sup>23</sup> Cass R Sunstein, 'Problems with Rules' (1995) 83 Cal L Rev 953, 958. See also Isaac Ehrlich and Richard A Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 JLS 257 and Pierre Schlag, 'Rules and Standards' (1985) 33 UCLA L Rev 379, 381-383.

<sup>24</sup> John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 47 and Collins (n 13) 268-271.

their function to be the ability to permit 'ongoing adaptation and response to new problems in line with the goals of the law'.<sup>25</sup> In favour of this proposition, Davidov identifies four key elements that may be attributed to standards of review. First, standards are sufficiently flexible to 'cover unforeseen situations'.<sup>26</sup> Rules, however, are too blunt since they are not elastic enough to cover the complete band of eventualities that may occur in the future.<sup>27</sup> Bearing in mind that the employment contract is inherently incomplete,<sup>28</sup> this feature of standards is particularly useful as well as appropriate in this context. Secondly, and on a closely connected note, standards are 'much better suited to accommodate change' insofar as they can be retained as they stand without constant updating and as such are impervious to 'obsolescence'.<sup>29</sup> Employee and managerial demands and expectations will inevitably evolve, in what is an ostensibly open-ended relationship. Thirdly, it has been argued that standards tend to be better at achieving altruistic and socially just or redistributive objectives,

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<sup>25</sup> Davidov (n 1) 147.

<sup>26</sup> Ibid 161.

<sup>27</sup> Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 McGill LJ 375, 409. For example, consider a rule in a statute passed in 1930 to the effect that 'all machines used in factory premises must be registered with the British Government'. If a child wanders around a car factory with her mother on a tour, would the word 'machine' include the child's smartphone?

<sup>28</sup> This is attributable to the 'bounded rationality' inherent in labour markets: Hugh Collins, *Employment Law* (2nd edition OUP 2010) 10 and William Brown and David Rea, 'The Changing Nature of the Employment Contract' (1995) 42 Scottish Journal of Political Economy 363-364.

<sup>29</sup> Davidov (n 1) 161.

whereas rules tend to secure fewer social purposes.<sup>30</sup> Finally, standards are ideally suited to achieving the objectives underpinning the law and limit the scope for employers to harness their managerial powers to engage in avoidance or circumvention techniques.<sup>31</sup>

The four key virtues of standards of review identified by Davidov can be referred to in shorthand as ‘flexibility’, ‘adaptability to change’, ‘altruistic potential’ and ‘anti-avoidance’. A separate, but equally interesting, question is whether there are any additional features of standards of review which we may have overlooked and which might be of particular importance, especially in the context of labour law? And, if so, what exactly might that relevance be? More on this point later in section 5 below, but first we turn to a taxonomy of standards of review.

### ***3. Differing Intensities of Scrutiny and Features Associated with the Standards of Review***

#### ***A. Introducing the Standards of Review in Labour Law***

Before enquiring whether and how certain features of standards of review are relevant to labour law, we must first say more about them, for example, by providing specific illustrations. The precise number of standards of review in labour law is open to debate, but in this article,

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<sup>30</sup> Kennedy, ‘Form and Substance in Private Law Adjudication’ (n 17) 1741-1751.

<sup>31</sup> Davidov (n 1) 161. However, putative employers in many legal systems have the capacity to circumvent the operation of employment laws by characterising their relationship as one that is not of employment, i.e. manipulating employment status: see Barmes (n 4) 62-65.

for the sake of argument, four specific standards are identified, namely the good faith, proportionality, rationality and range of reasonable responses standards.

#### *B. The Four Standards of Review in Labour Law*

The first standard we can evoke is the implied term of mutual trust and confidence which is steeped in the open-textured notion of good faith.<sup>32</sup> This term is implied into every contract of employment governed by English or Scots law and enables a court to evaluate the conduct and decision-making of an employee or an employer on a broad-brush basis. According to this term, good faith conduct is equated to behaviour that does not destroy or severely undermine the other party's trust and confidence in the employment relationship, without proper or reasonable cause.<sup>33</sup> As such, the destruction or severe undermining of trust and confidence is a breach of the good faith requirement. Admittedly, the nature of this good faith standard is complex and can be portrayed as possessing a sophisticated amalgam of rule-like and standard-like features. This can be demonstrated if we adopt one, albeit an influential, account of the case law on the implied term of mutual trust and confidence, which divides this good faith standard into five constituent strands.<sup>34</sup> First, there is the broad strand which

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<sup>32</sup> *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503, 523G (Lord Nicholls), *Imperial Group Pension Trust Limited v Imperial Tobacco Limited* [1991] ICR 524 (Ch) 533 (Sir Browne-Wilkinson V-C) and *Johnson v Unisys Ltd.* [2001] UKHL 13, [2003] 1 AC 518, 536D (Lord Steyn).

<sup>33</sup> *Malik v BCCI* [1998] AC 20 (HL).

<sup>34</sup> Alan Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2011) 32 Comparative Labor Law and Policy Journal 729, 759-762.

focuses on the control of the employer's express or implicit discretionary powers.<sup>35</sup> A second is its concern with ensuring the consistent treatment of workers.<sup>36</sup> The third strand enjoins employers to provide various forms of disclosure to workers or prior consultation in advance of decisions which directly affect them.<sup>37</sup> Fourth, the implied term protects the legitimate expectations of workers.<sup>38</sup> The final strand addresses the provision of reasonable notice in certain contexts, e.g. where an employer invokes a mobility clause to force a worker to relocate.<sup>39</sup> What distinguishes the first three strands from the fourth and fifth is the former's preoccupation with the consistent treatment of workers in the abstract, whereas the abiding concern of the latter seems to be to differentiate between workers in a manner which achieves a more substantive form of equality,<sup>40</sup> i.e. what amounts to 'reasonable' notice will vary from case to case, as will an employee's 'legitimate expectations'. This speaks to the

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<sup>35</sup> For example, in *Gogay v Hertfordshire County Council* [2000] IRLR 703 (CA), *TFS Derivatives Limited v Morgan* [2004] EWHC 3181 (QB), [2005] IRLR 246 and *Land Securities Trillium Ltd. v Thornley* [2005] UKEAT/0603/04/SM, [2005] IRLR 765, where the exercise of suspension, garden leave and flexibility clauses in employment contracts were regulated.

<sup>36</sup> *Transco Plc v O'Brien* [2002] EWCA Civ 379, [2002] ICR 721.

<sup>37</sup> *Visa International v Paul* [2003] EAT/97/02/TC, [2004] IRLR 42 and *McBride v Falkirk Football & Athletic Club* [2011] UKEATS/0058/10/BI, [2012] IRLR 22.

<sup>38</sup> *French v Barclays Bank plc* [1998] IRLR 646 (CA).

<sup>39</sup> *United Bank v Akhtar* [1989] UKEAT/230/88, [1989] IRLR 507.

<sup>40</sup> See Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 CLJ 562 and Sandra Fredman, *Discrimination Law* (2nd edn OUP 2011) 2-4.

‘standard-like’ characteristics of the fourth and fifth threads and the ‘rule-like’ nature of the first, second and third.

Likewise, we encounter the aforementioned proportionality standard of review in the context of workplace discrimination law. According to this standard, an employer must not disproportionately apply a PCP or policy in order to achieve a legitimate aim if it puts or would put employees of a particular protected characteristic (such as sex, race, disability, etc.) and the employee claimant specifically, at a particular disadvantage.

This particularly intensive proportionality standard of review can be contrasted with the more forgiving (from the employer’s perspective) rationality and range of reasonable responses standards. First, the concentration of review of the employer’s conduct or decision-making in the case of the rationality standard is somewhat lax, since it requires an adjudicator ‘to put [its]elf in the shoes of those making the decision’<sup>41</sup> and directs it towards an enquiry as to whether no rational employer would have exercised its discretion in the way that it did, i.e. whether the outcome/decision/conduct was irrational.<sup>42</sup> As such, if the employer is able to point to even at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, the claimant will fail to discharge the rationality standard of review. As for the range of reasonable responses standard, this is encountered where the evaluation of an employee’s dismissal for unfairness is in play in terms of section 98 of the ERA. It entails a (slightly) more exacting concentration of review of managerial

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<sup>41</sup> *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942, 950 (Potter LJ).

<sup>42</sup> *Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132, 136 (Mummery LJ).



conduct and decision-making than the rationality standard insofar as it enjoins an adjudicator to enquire whether the employer's decision or conduct is one falling within the band of reasonable responses that reasonable employers might take.<sup>43</sup> If the employer's decision features on the list of responses that a range of reasonable employers would have taken, then the employee will fail to meet the standard of review.

### *C. The Hierarchy of Standards of Review in Labour Law*

Table 1 in the annex demonstrates how each of the four standards of review can be distinguished in two ways: first, in terms of the intensity of scrutiny of management that they entail; secondly, in terms of whether that intensity of review is fixed or fluctuates according to the context. By way of explanation in relation to the latter, some standards will involve the application of a fixed intensity, whereas the intensity applied by others will vary on a context-dependent basis. In general, fluctuating standards are more complex and potentially piercing in their operation and penetration, since they are self-modulating. For example, if we take the rationality standard, this is without doubt, fixed: either there is at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, or there is not. An unwavering threshold for liability obtains in all cases in which the fixed standard is operative irrespective of the context or the concrete vulnerabilities or peculiarities of the employer and/or the employee. However, this is not so in the case of the proportionality standard, which fluctuates in intensity. It is characterised by a fleet of foot

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<sup>43</sup> *Iceland Frozen Foods Ltd v Jones* [1982] EAT 62/82, [1982] IRLR 439, 442-443 (Browne-Wilkinson J) and *Post Office v Foley* [2000] IRLR 827 (CA) 829 (Mummery LJ).

that allows it to internally adjust itself to impose variable depths of scrutiny of management depending on the context. Likewise, in the case of the 'range' standard.

Table 1 enables the standards of review to be charted in terms of a hierarchy in the abstract, e.g. with proportionality exerting the most searching degree of scrutiny of managerial conduct, followed by the good faith standard, then the range of reasonable responses test, with the rationality basis of review at the bottom. A central question is whether it is desirable and feasible for an area such as employment law to apply such a broad variety of differing standards of review. For example, there is a concern that in certain factual contexts:

- (1) a standard that ought to be fixed in its intensity may instead be treated by the courts as one that oscillates, and that

(2) different standards of review may be conflated on occasion,<sup>44</sup> including in circumstances where more than one standard is invoked in a single legal claim.<sup>45</sup>

This gives rise to the anxiety that the law can be applied:

- (a) inconsistently, e.g. with the conduct of larger or better resourced employers reviewed on the basis of heightened intensities of scrutiny;
- (b) incoherently, e.g. inasmuch as the law imposes adverse mental gymnastics on the courts and tribunals and sends mixed signals to employers about the expectations it has regarding the applicable and appropriate level of scrutiny of their conduct and/or decisions; and

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<sup>44</sup> See for example, the view advanced by Lord Justice Elias that the range of reasonable responses standard could fluctuate in the same manner as the proportionality standard, e.g. to impose a higher standard according to the impact of dismissal on the employee. This was used as a justification to reject the application of the latter standard in a particular case: *Turner v East Midland Trains* [2012] EWCA Civ 1470, [2013] ICR 525, 541C-F (Elias LJ). Contrast this with *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565, where the Court of Appeal was critical of the attempt by counsel to conflate the range of reasonable and proportionality standards of review.

<sup>45</sup> For an overt example of the conflation of the proportionality and range of reasonable responses standards in a single claim, see *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145, [2017] ICR 737, 756A-G (Underhill LJ).

(c) without impartiality, e.g. that the application of each of the standards of review in an inconsistent manner leaves the law open to the accusation that it is biased and partial in its operation.

The salience of this anxiety is in fact supported by growing empirical evidence which suggests that differing standards of review give rise to undue legal complexity and overly technical doctrinal distinctions in litigation processes.<sup>46</sup>

However, rather than make the case for various reform options, e.g. for (1) a limited amount of alignment, according to the similarity of the employment rights attracting the standards of review, or (2) the wholesale assimilation of standards, e.g. to the proportionality (or some other) standard,<sup>47</sup> this debate is parked at this juncture and will be revisited later in the discussion. Instead, first, we focus on the dual role of labour law in addressing (i) labour

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<sup>46</sup> Barmes (n 4) chs 4, 5 and 6, particularly 119-120, 124-128 and 133-137 on how legal practitioners can harness distinctions in the standards of review as part of their litigation strategies and processes in order to initiate and defend employment law claims. See also Barmes, 'Common Law Confusion and Empirical Research in Labour Law' (n 4) 107, 109 and 116 and Lizzie Barmes, 'Individual Rights at Work, Methodological Experimentation and the Nature of Law' in Amy Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart Publishing 2015) 19.

<sup>47</sup> See Alon-Shenker and Davidov, 'Applying the Principle of Proportionality' (n 27) 414-422 and Guy Davidov, 'The Principle of Proportionality in Labor Law and its Impact on Precarious Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 63.

market failures and (ii) concrete vulnerabilities and imperfections in the operation of specific employment relationships.

#### ***4. Systematic Failures in the Labour Market and Internal Vulnerabilities in Employment Relationships***

One of the insights to be drawn from recent debates concerning the relative importance of concepts such as ‘subordination’ and ‘domination’<sup>48</sup> to labour law, has been the elevation of the significance of the distinction between group/economic subordination and the structural dependency of the worker/employee on the one hand, and the latter’s individual subordination and dependency on the other. Group/economic subordination and structural dependency encompass the reliance of employees on wage labour for subsistence and the entrenched disparity in the distribution of resources between employers and employees in the marketplace.<sup>49</sup> This can be contrasted with the latter two variables of individual subordination and dependency which embody the internal and customised vulnerabilities experienced by employees pursuant to their specific labour relationship.<sup>50</sup> Whilst the two

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<sup>48</sup> Davidov, ‘Subordination versus Domination’ (n 1) 368-370, David Cabrelli and Rebecca Zahn, ‘Civic Republican Political Theory and Labour Law’ in Hugh Collins and Virginia Mantouvalou (eds), *Philosophical Foundations of Labor Law* (OUP 2018) 104 and David Cabrelli and Rebecca Zahn, ‘Theories of Domination and Labour Law: Domination as an Alternative Conception for Intervention?’ (2017) 33 IJCLIR 339, 358-361.

<sup>49</sup> See Harry Arthurs, ‘Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment’ (2013) 34 Comparative Labor Law & Policy Journal 585.

<sup>50</sup> Davidov (n 1) 51-52 and Davidov, ‘Subordination versus Domination’ (n 1).

features of group/economic subordination and structural dependency are present in every arrangement struck between an employer and an employee, they are 'external' to their private law bargain in the sense that they are market-related and invariably integrated into every relationship at *more or less the same level of intensity*, i.e. as a numerical 'constant',<sup>51</sup> and a kind of 'background noise'.<sup>52</sup> An additional feature is the plural nature<sup>53</sup> of these two variables, which lies in stark contrast to the individualistic incarnation of the subordination and dependency elements. That is to say that in the abstract, both of these elements apply universally to all employment relationships.

The group/economic subordination and structural dependency factors are closely connected to routine imperfections experienced by employees in the labour market: like all markets, the labour market is subject to general systematic failures.<sup>54</sup> We can evoke five of

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<sup>51</sup> See section 5 for a detailed explanation.

<sup>52</sup> Of course, the group/economic subordination and structural dependency characteristics are not unique to employment and it is uncontroversial to assert that they can also be found in consumer, franchising and other private relationships. For example, franchisees are generally structurally dependent on the franchisor and subordinate as a group in economic terms to the latter as a constituency: see Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance' (n 49).

<sup>53</sup> In the sense that they impact upon workers as a group in the abstract.

<sup>54</sup> See Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices*, July 2017

<[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf)> accessed 19 January 2019 104.

these imperfections in turn, namely (i) informational imbalances, (ii) labour market entry and exit barriers, (iii) transaction costs, (iv) coercive or opportunistic employer behaviour, and (v) bounded rationality:

- (i) Labour relationships are routinely marred by informational imbalances with employers enjoying greater expertise and access to and understanding of the mechanics and operation of the relevant labour market, as well as the information and knowledge available relative to that market. For obvious reasons, this places the employee in a disadvantageous position relative to their employer;
- (ii) Likewise, entry and exit barriers to labour markets, such as eligibility, qualifying and probationary conditions, lengthy notice periods, garden leave and non-compete clauses, etc. tend to impact negatively on employees in comparison with analogous provisions (if any) binding employers. The negative effects on employees can be attributed to the latter's greater resources;
- (iii) As for transaction costs – such as the search costs of bringing the employer and employee together, the costs of the contract negotiation, writing and adjustment processes and the costs of contractual monitoring and enforcement<sup>55</sup> – these tend to adversely affect the employee much more than the employer. Whilst the search process and acceptance of employment terms

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<sup>55</sup> Michael L Wachter, 'The Striking Success of the NLRA' in Cynthia Estlund and Michael L Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012) 445.

may seem to cost the employee nothing, they will do so in the long run insofar as the employer will pass them on indirectly to the employee in terms of reduced pay or benefits, deferred promotion, etc. And as a matter of course, employers will have access to greater resources which can be brought to bear on the negotiation process to elicit the contractual terms most favourable to their own interests;

- (iv) As repeat players in the labour market and monopsonistic hirers of labour,<sup>56</sup> employers are also prone to engaging in coercive or opportunistic behaviour to the detriment of their employees. Such conduct may involve the inconsistent treatment of workers, e.g. where colleagues enjoy enhanced payments for a form of leave, but an employee is refused the same enhancement on arbitrary grounds;
- (v) As demonstrated by behavioural economics, the average human being – and employee – will tend to make irrational decisions based on the limited amount of time available for decision-making, the inability to make future plans owing to the fallibility of past experience and the general lack of awareness caused by inherent limitations in human cognitive functions.<sup>57</sup> This phenomenon is

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<sup>56</sup> Simon Deakin, 'The Law and Economics of Employment Protection Legislation' in Cynthia Estlund and Michael L Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012) 334.

<sup>57</sup> See Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99, Herbert A Simon, 'Rationality as Process and as Product of Thought' (1978)



referred to as 'bounded rationality'. One recent example of a legal response to 'bounded rationality' in the workplace is the 'default' requirement for employees to contribute to an auto-enrolled pension scheme set up by their employers. This statutory measure is directly justified by the tendency of employees to act irrationally and not save for their retirement unless 'nudged' to do so.<sup>58</sup>

In many ways, these systematic failures are not unique to labour markets, and are equally present in consumer markets, for example. But the fundamental point about each of them is that although they may be depicted as factors that tend to show that labour markets are not perfectly competitive,<sup>59</sup> they are not unique market characteristics and are 'external' to

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68 American Economic Review 1, 10, Herbert A Simon, 'Theories of Decision-Making in Economics and Behavioral Science' (1959) 49 American Economic Review 253, Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000) 3 and Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000) 29.

<sup>58</sup> See Amanda Wyper, 'Pensions Auto-Enrolment: Unintended Consequences of Regulation and Private Law Remedies' (2017) 21(3) Edin LR 352.

<sup>59</sup> Alan Manning, *Monopsony in Motion: Imperfect Competition in Labour Markets* (Princeton University Press 2003) 3–12 and Bruce E Kaufman, 'Economic Analysis of Labor Markets and Labor Law: An Institutional/Industrial Relations Perspective' in Cynthia Estlund and Michael L

particular labour relationships in the sense that they are not attributable to, or a by-product of, personal power-related interactions between an employee and employer in terms of a specific employment contract.

Unlike structural dependency and group/economic subordination, the two variables of individual subordination and dependency are internal to the relationship of the parties. The degree of individual subordination and dependency experienced by the employee will vary according to the particularities of the employment contract, including the sort of relationship they have with their line manager or other members of management, the culture of the employer's organisation and how employees react to workplace conversations and instructions. Hence, it will be conditioned by the unique behavioural traits of the parties, managerial personalities and the terms and conditions agreed upon, as well as the workplace context within which the relevant management practices are applied and the two parties contract.<sup>60</sup> Unpacking this observation, we can identify two main points:

- First, we can contrast the abstract labour market-related imperfections with the tripartite categorisation of concrete employment-relationship vulnerabilities and failures put forward by Davidov. Whilst not intended to be exhaustive, we can evoke the:
  - (1) democratic deficits experienced by employees in the sense of the varying degrees of inability to influence, shape or exert voice in respect of

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Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012) 82.

<sup>60</sup> See the empirical evidence in Barmes (n 4) 186-189.

managerial decisions which affect their terms, conditions and the performance of their work,<sup>61</sup>

- (2) the social and psychological reliance of the worker on the work offered by employers for personal relationships, e.g. the social sense of well-being and societal participation and belonging that comes from work,<sup>62</sup> and
- (3) the economic dependency personal to each employee insofar as they have no ability to spread their risks and invariably have 'placed all their eggs in one basket' in having relied financially on one employer.<sup>63</sup>

This trio of vulnerabilities will be present in most employment contracts, but it is a matter of degree how deeply embedded they will be in any single case. Where a labour relationship is characterised by one or more of these factors, there is an argument that an authority or power ought to step in to police matters.

- Secondly, labour laws not only regulate for vulnerabilities in identifiable individual employment relationships but also act directly on informal and formal practices of the employer and certain contextual situations. Some of those practices, situations or contexts will be controlled or scrutinised more strictly than others. For example, discriminatory practices, infringements of human rights, redundancies, forced

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<sup>61</sup> Davidov (n 1) 36-43.

<sup>62</sup> Ibid 43-45.

<sup>63</sup> Ibid 45-48.

relocations, etc. are treated by labour laws as giving rise to the potential for great harm to employees and deserving of special attention and stricter regulation.

The task of policing employment relationship-specific vulnerabilities and particular managerial practices and factual contexts can be distinguished from the regulation of general labour market imperfections. Both of these regulatory undertakings form an integral part of the function of labour laws. However, it should be stressed that this is not to claim that these two strands are the exclusive actual goals or purposes of labour law, since this would overlook the significant role of labour law in promoting certain values and interests.<sup>64</sup> For example, the inter-related social justice, social inclusion and human rights dimensions of employee and worker freedoms which transcend these dual objectives, manifested in institutions of labour law such as freedom of association, collective bargaining, political voice and industrial action in more general terms. This underscores the crucial distinction between the actual function/purposes/objectives of, and values/interests promoted by, labour law.

But, of course, one of the key questions is ‘how’ do labour laws operate to control general labour market imperfections, suppress employment relationship-specific vulnerabilities in the case of particular managerial practices and factual contexts, and promote values and interests such as human rights, freedom of association, social justice, etc?<sup>65</sup> This question takes the discussion back to the various forms in which legal directions

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<sup>64</sup> For discussion, see Guy Mundlak, ‘The Power of Purpose: Comments on *A Purposive Approach to Labour Law*’ (2017) 16 Jerusalem Review of Legal Studies 40, 43-45.

<sup>65</sup> Another question is ‘why’? However, space does not permit us to engage in a discussion about the normative justifications for labour laws, whether moral, economic, social, or

or commands may be expressed, e.g. rules or standards of review and in section 5, we go on to discuss the benefits and utility associated with differing standards of review in tackling concrete vulnerabilities and imperfections in the operation of specific employment relationships.

## ***5. Tackling Systematic Failures in the Labour Market and Internal Vulnerabilities in Employment Relationships: The Distinct Roles of Rules and Standards***

### ***A. The Role of Rules and Standards of Review in Labour Law***

The starting point for this discussion is the observation that, like all markets, the labour market is subject to systematic failures. Labour laws are occasionally justified by economists in such general terms. In other words, that labour law is designed to ‘cure’, eradicate or curtail such market imperfections. Indeed, that is one of the premises underpinning the ‘law of the labour market’ account of labour laws.<sup>66</sup> This formulation points to the claims made by successive governments to the effect that the intended function of labour law is labour market regulation, e.g. that it has an essential role in addressing the adverse market and social

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political in nature. Nonetheless, some engagement with those justifications is pursued to the extent that they cast light on the actual function of labour law.

<sup>66</sup> Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) and Simon Deakin, ‘A New Paradigm for Labour Law? A Review of C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006)’ (2007) 31 Melbourne University Law Review 1161, 1170-1171.

costs produced by the systematic market failures identified in section 4.<sup>67</sup> These labour market failures map on smoothly to the two features of group/economic subordination and structural dependency of the worker/employee that we noted in section 4 are present in every employment relationship between an employer and an employee, and are 'external' to their contractual arrangements.

Indeed, it is true up to a point that labour laws can be conceived in such abstract terms, whereby only general market failures are the target of its focus. But it does not capture the full picture, since it is 'very difficult to make a more concrete connection between existing [specific] labour laws and concrete market failures'.<sup>68</sup> We cannot guarantee that labour laws or employment rights will produce a perfectly competitive market in the case of every employment relationship, which is exactly what we must assume would be the outcome if they could be conceived of as having the limited purpose of correcting systemic imperfections.

This article makes the argument that there is a marked relationship between fixed and rigid rules of labour law and abstract market imperfections. The claim is that the maximum regulatory impact that can be expected of employment rights drawn up as rules will be restricted to correcting general labour market failures. Take, for example, the rules of labour law enjoining employers to disclose information to employees, such as the reason for an employee's dismissal (ERA),<sup>69</sup> the fact that the employer is exercising its right to

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<sup>67</sup> See *Good Work* (n 54) 104.

<sup>68</sup> Davidov (n 1) 51.

<sup>69</sup> ERA s. 92.

terminate/dismiss,<sup>70</sup> details of opportunities for promotion<sup>71</sup> or permanent recruitment,<sup>72</sup> or the reason for a particular monetary figure chosen as a bonus payment, etc.<sup>73</sup> These fixed disclosure rules are less well-suited, inclined or likely to tackle internal vulnerabilities experienced by employees in their specific employment contract. Instead, their maximum effect will be to track the general market failure of information asymmetries in the employment relationship and offset natural informational imbalances which the employer may be tempted to capitalise upon to tilt matters in favour of their own interests at the expense of their employees. These rules achieve this by providing employees with basic, but enhanced knowledge and understanding of management decisions: in the words of both Baroness Hale and Lord Justice Mummery, ‘both employer and employee need to know where they stand’<sup>74</sup> and ‘[t]he explanation [of how the employer exercised its discretion] ought to be given by the person(s) responsible for the decision... [and] involve making known to the employee... the factors which have influenced the decision, by whom the decision was taken and the reasons for [it].’<sup>75</sup> However, they only go so far, since they assume that all employees – no matter how vulnerable, dependent or subordinate to their employers – will benefit from such information, when in reality, such disclosures are likely to be of marginal

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<sup>70</sup> *Geys v Societe Generale, London Branch* [2012] UKSC 63, [2013] 1 AC 523, 548A-C (Baroness Hale).

<sup>71</sup> *Visa* (n 37).

<sup>72</sup> The Agency Workers’ Regulations 2010, SI 2010/93, reg 13.

<sup>73</sup> *Commerzbank* (n 42) 135 (Mummery LJ).

<sup>74</sup> *Geys* (n 70) 548B (Baroness Hale).

<sup>75</sup> *Commerzbank* (n 42) 135 (Mummery LJ).

benefit to employees in more precarious relations.<sup>76</sup> Likewise, take the example of the implied good faith term of mutual trust and confidence, part of whose remit is to insist on consistent treatment in like cases in a rule-like manner, e.g. the breach of that term where an employer fails to give the employee new contractual terms affording an enhanced redundancy package which has been offered to all other permanent employees.<sup>77</sup>

However, many labour laws are also concerned with the reduction of employment relationship-specific failures or managerial practices and workplace contexts or situations. In other words, case by case factors such as employee vulnerabilities, dependencies or the degree of individual subordination that are/is particular to specific employment relationships, including the resources, size or sophistication of the employer and the practices of management which may give rise to the arbitrary treatment of workers in connection with managerial decisions, e.g. redundancy, demotion, dismissal, promotion, forced relocations, hiring, etc. To recap, Davidov pinpointed three illustrations of such employment-specific vulnerabilities, namely the psychological and social reliance of employees on their job, their inability to spread their risks across a number of employers and the democratic deficits and economic dependency they experience. It is in respect of such specificities that we can recognise a tangible connection with the standards of review and in particular, the oscillating and self-modulating standards of review identified in Table 1, such as the proportionality, range of reasonable responses and good faith standards. In contrast, where an employment

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<sup>76</sup> For example, the aforementioned employment law rules providing rights to information only extend to employees engaged on a contract of employment: (i) the reason for dismissal, and (ii) that the employer has exercised its right to dismiss.

<sup>77</sup> See *Transco* (n 36).



right is crafted as a rule, the parity-enhancing nature and effects of such a legal command will make it less well-suited, disposed, or likely, to have any regulatory effect on such employment-particular vulnerabilities, which demand disparity of treatment. This point can be illustrated if we invoke the proportionality standard. Its open-textured and self-modulating character – in its content and operation – suggests that it harbours an abiding preoccupation with specific employment contracts: if the degree of arbitrariness in discretion enjoyed by the employer in a relationship 1 is greater than that available to an employer in the context of a relationship 2, the content of the controls exerted by the proportionality standard in the case of these two employment contracts will vary, with a higher weighting in the case of 1. In such a case, the potential for employer abuse in the labour market generally or in the abstract is not the specific target of the proportionality standard. Instead, it is the particularities of the relationship, such as the imbalances in the contractual terms governing the relationship, the employee's interactions with management and the impact of certain workplace practices, that are controlled by this standard of review. All of this simply drives the point home: that the proportionality standard in labour law, just like all oscillating-intensity standards of review, will govern and act directly upon the particularities of an employment relationship to produce a legal outcome.

So far, so good, but what is the significance of these observations? The answer is that the point made in passing in the preceding paragraph about the 'open-textured character' of labour laws crafted as self-modulating standards of review – and their role in acting directly on the particular vulnerabilities experienced by the employee to generate tailored outcomes – rather gives the game away. That is to say that unlike standards of review, legal commands that adopt fixed and rigid rules to confer employment rights can be conceived of as well-disposed and likely to act directly on the aforementioned 'external' factors of structural

dependency and group/economic subordination. They do so by dislodging or minimising the informational advantages and other labour market imperfections wielded or exploited by the employer over the employee, e.g. via duties of disclosure. Other labour market imperfections of a general nature will also be curtailed by rigid rules of labour law, as follows:

- (1) part of the explicit transaction costs associated with negotiating, writing and enforcing employment contracts: rules such as the statutory obligations imposed on employers to provide employees with the main particulars of their employment<sup>78</sup> and the common-law default rule that the contract is of open-ended duration<sup>79</sup> are well-suited and inclined to address these transaction costs;
- (2) the bounded rationality of the parties: these are acted upon by rules prescribing disclosure and other mandatory norms of a paternalistic hue such as the requirement for legal or trade union advice on signing a settlement agreement on dismissal, redundancy, etc;<sup>80</sup>

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<sup>78</sup> ERA ss 1-3.

<sup>79</sup> *De Stempel v Dunkels* [1938] 1 All ER 238 (CA), *Richardson v Koefod* [1969] 1 WLR 1812 (CA) and *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594 (HL). See also Cynthia L Estlund, 'Why Workers Still Need a Collective Voice' in Cynthia Estlund and Michael L Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar, 2012) 474. If the default rule was the 'annual hiring' (as it was historically), the employer would incur search, negotiation, writing and enforcement costs every year in respect of the fresh supply of labour.

<sup>80</sup> ERA s. 203(3), (3A), (3B) and (4).

(3) barriers to admission to, and exit from, the labour market: measures drawn as rules, such as anti-discrimination laws,<sup>81</sup> the common law ‘freedom to quit’ rule<sup>82</sup> and the ‘unrestricted reasonable notice’ rule are well-suited to tackling such obstacles;<sup>83</sup>

(4) the potential for opportunistic or coercive behaviour on the part of management: rules of universal application are well-oriented to minimise these forms of conduct, e.g. ‘just cause’ dismissal laws<sup>84</sup> and statutorily imposed contractual terms and conditions in the guise of, for instance, the National minimum wage,<sup>85</sup> restrictions on working time<sup>86</sup> and the right to equal pay.<sup>87</sup>

However, unlike the above rules, standards of review involve the application of disparate intensities of scrutiny of managerial decision-making, from more heightened to

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<sup>81</sup> Equality Act 2010.

<sup>82</sup> *Nokes v Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014 (HL) 1018–1033 (Viscount Simon and Lord Atkin).

<sup>83</sup> *Baxter v Nurse* (1844) 6 Man & G 935, 134 ER 1171, *Robson v Overend* (1878) 6 R 213, *McClelland* (n 79) 599 (Lord Oaksey) and *Reda v Flag Ltd* [2002] UKPC 38, 38 (Lord Millett). What is said here about the ‘unrestricted reasonable notice rule’ is subject to the content of footnote 12.

<sup>84</sup> ERA pts X and XI.

<sup>85</sup> National Minimum Wage Act 1998 s. 17.

<sup>86</sup> Working Time Regulations 1998, SI 1998/1833, reg. 4(1).

<sup>87</sup> Equality Act 2010 s. 66(1) and (2).

lower concentrations of review. In particular, the standards of review that are configured in a self-modulating way – such as the proportionality, range of reasonable responses and good faith standards<sup>88</sup> – are a form of legal command optimally designed to act upon such special dependencies, subordination and vulnerabilities. This is both a *descriptive and prescriptive claim* to the effect that – in comparison with employment rights expressed as rules – the inherent properties of standards with fluctuating intensities of review are such that they are in actual fact, and ought to be, better disposed, and more likely to promote certain values, and subject such internal vulnerabilities to scrutiny even in spite of market stability.<sup>89</sup> These fluctuating norms are crucial in demonstrating the match in the normative connections between labour rights and the aforementioned internal vulnerabilities and particular factual contexts. The emergence of these normative propositions may be attributed to the inherent flexibility and in-built sensitivity of these standards of review – as noted by Davidov in the first and second characteristics of ‘flexibility’ and ‘adaptability to change’ discussed in section 2 above – as well the degree to which they may be finely attuned to the characteristics of employment relationships. The application of standards of review enable adjudicators to customise judicially prescribed normative solutions to the factual context and vagaries of each contractual engagement. In effect, we can compare the parity-enhancing consequences of the application of rules of labour law with that of standards of labour law that ensure *the*

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<sup>88</sup> See Table 1 for an explanation as to how and why such standards self-adjust their attendant intensity of scrutiny of employer decision-making and conduct.

<sup>89</sup> For a discussion of the importance of clarifying whether a proposition is descriptive or normative, or both, see Adam J Kolber, ‘Ten Commandments for Legal Scholars’ (Paper on File with Author).

*unequal treatment* of workers as a result of the intrinsic self-adjusting intensity of scrutiny involved. To put the point more forcefully, standards have the capacity to generate disparities in the treatment of workers, and thus confer preferential treatment, particularly, but not exclusively<sup>90</sup> in the case of workers' human or fundamental rights. In essence, the conclusion can be drawn that standards of review are an inherently relational and contextual form of regulation of managerial behaviour.<sup>91</sup> In the same way that Bogg makes a persuasive argument that 'relational' accounts of labour law have the capacity to generate more worker-protective outcomes than those rooted in 'personal' frameworks,<sup>92</sup> so do standards of review with fluctuating intensities of scrutiny. This can be laid at the door of the greater scope for exclusionary effects on workers' protective rights that may be ascribed to rules. This can be contrasted with standards and their internal malleability and inclusionary effects.

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<sup>90</sup> For instance, other significant workplace practices or events such as alleged discriminatory behaviour, unfair dismissal, forced relocation or arbitrary managerial conduct will also be subject to standards of review such as proportionality. This reflects the public law origins of the proportionality standard (see the role of proportionality as a ground for the judicial review of administrative action in *Kennedy v Charity Commission* (*Secretary of State for Justice intervening*) [2014] UKSC 20, [2015] AC 455 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591) applicable in the case of employment discrimination law (see Equality Act 2010 ss. 15(1)(b) and 19(2)(d)), which intensifies the level of managerial scrutiny where fundamental and human rights are at stake.

<sup>91</sup> This is not to argue that it is *only* standards of review that serve some function other than correcting market failures, as it is accepted that other labour law norms may also do so.

<sup>92</sup> Bogg, 'Labour, Love, and Futility' (n 3) 23-26.

## B. Testing the Hypothesis

### (i) Introduction

Some may dismiss the argument advanced in this paper that the nature and qualities of rules are such that they (i) will only have an impact on the general imperfections present in the labour market, whereas standards will *also* regulate (ii) the specific dependencies and vulnerabilities experienced by employees. At the root of this objection is the proposition that *both rules and standards* will perform functions (i) and (ii), and to argue otherwise is nonsensical. There is the additional counter-argument that we can always re-characterise how standards of review are applied. Here, the suggestion is that even when they look like they are regulating concrete vulnerabilities, they are in fact performing the function of correcting general labour market failures. In particular, it could be argued that the proportionality standard was recognised as part of labour law to incentivise workers to accept jobs and keep the market stable. The question is whether and how the central claim advanced in this paper can be defended by providing an explanation why this sort of intellectual move is unfounded.

Although possessing the attraction of simplicity, careful analysis suggests that these points are likely bankrupt. In order to substantiate this observation, we have to do two things: first, identify, and then address, some obvious objections to the account of the relative suitability of the roles of rules and standards presented in this article; and secondly, adopt a thought experiment.

### (ii) Specific objections

(a) Rejection of proposition that rules are well-suited or likely to address failures in the labour market, but not equipped to minimise internal vulnerabilities

This objection rests on rule-based interpretations of the rule of law, i.e. the Hayekian argument that the manner in which rules are applied is invariably reflective of the idea of formal equality before the law and as such, rules act as supporters, rather than disruptors of free markets and inequality.<sup>93</sup> This line of argument claims that insofar as everyone is bound by rules, they are open to the charge that they are woefully insufficient to tackle failures in labour and other markets because all they can do is secure formal or consistent treatment. If true, this would severely undermine the claim in this article, as it suggests that the inherent properties of rules are neither well-disposed to tackling internal vulnerabilities, *nor labour market failures*. However, Sunstein rebuts this argument by demonstrating that the variable content of rules has significant consequences. It is true that rules are of uniform and formal application to secure consistent treatment, but they do not do so by blindly supporting free markets and securing inequality:

A familiar challenge to rules-that they promote merely formal equality-is... unconvincing. Rules could provide that no person may have more than one dollar more than anyone else, or that the average income of men and women must be the same, or that all racial groups must have the same proportional wealth. There is no necessary association between rules on the one hand and conservatism, free markets, or inequality on the other.<sup>94</sup>

As such, we can see that depending on the content of a rule, it can function to address labour market failures and imperfections. Seen from this perspective, there is no basis for the claim

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<sup>93</sup> See Friedrich A Hayek, *The Constitution of Liberty* (Routledge Classics 2006) 130-141.

<sup>94</sup> Sunstein, 'Problems with Rules' (n 23) 983.

that rules cannot act to drive down general labour market failures on the ground that they are designed to ensure the stability of free markets.

(b) The 'public' role of fluctuating standards of review: proportionality

One of the claims made in this article is that the proportionality standard incorporates a self-adjusting intensity of review that enables it to adopt case-by-case and discretionary judgments at the point of its application in adjudication. In essence, standards such as proportionality represent one of the routes through which adjudication can ensure interference with the balance of power in an identifiable interpersonal relational contract of employment. However, some would object that this proposition is paradoxical and at worst, anaemic, in light of the origins and source of this standard of review. Here, we must face the formidable charge that the role of proportionality cannot be limited to the regulation of particular interpersonal employment contracts, but that it is designed to serve a greater balancing of public interests. This can be ascribed to the public law origins of the proportionality standard.

Of course, it is recognised that part of the function of that standard is to take account of matters of broader public interest and concern in balancing the interests of the public and government, e.g. social welfare, taxation, human rights protections, including an assessment as to what is fair to all as opposed to sectional concerns only, e.g. employees or employers, or a particular employee/employer. However, the argument here is not that standards of review focus exclusively on addressing relational vulnerabilities, *but that the standard as a matter of jurisprudence will fare much better at that role relative to rules*. The issues of public



concern will also be tackled by standards too, and particularly intensively so, where the employment is a public office.<sup>95</sup> Hence, by focusing on the policing of the interpersonal relational contract between the employer and employee, it is not claiming that outside matters of public interest are irrelevant when standards of review such as proportionality, range of reasonable responses, etc. are applied. Instead, these are supremely relevant and human rights and redistributive calculations and concerns will be taken into account in policing the internal vulnerabilities, e.g. note how human rights arguments are part of the proportionality evaluation. As such, rules which act to tackle labour market failures are not to be equated with regulatory responses that are exclusively public interest oriented in nature and relational contract regulation is not to be equated with the regulation of exclusively private interests.

(iii) Adopting a 'notional quantification' thought experiment

In adopting the thought experiment adverted to, we must first ask doubters to suspend their misgivings and accept the point that rules and standards can be clearly distinguished depending on the accessibility, adaptability and determinacy of a legal command. Secondly, we must also engage in an exercise involving the 'notional quantification' of the costs associated with (i) general imperfections arising in the labour market and (ii) the individual vulnerabilities experienced by employees in their particular employment relationship. We can

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<sup>95</sup> For example, see *R (on the application of Shoemith) v OFSTED* [2011] EWCA Civ 642, [2011] ICR 1195, Lisa Rodgers, 'Public Employment and Access to Justice in Employment Law' (2014) 43 ILJ 373 and Lisa Rodgers, 'The Interpretation of Article 6 ECHR and Access to Justice for Public Employees' (2015) 40 EL Rev 563.

then examine how employers are likely to respond to accessible rules on the one hand, and comparatively less accessible standards on the other, that are intended to suppress such costs. For example, we have noted that general labour market failures consist of transaction costs, which we will call (A), informational deficits (B), opportunistic behaviour (C), bounded rationality (D) and entry/exit barriers (E). If we assume that the costs attributable to each of these imperfections (A) to (E) can be expressed as a mean figure in a particular sector of the economy, e.g. financial services, then we can aggregate each of (A)+(B)+(C)+(D)+(E). The product of this calculation, which we will call (Y), are the costs associated with the general level of market failure in the financial services industry articulated in approximate numerical terms. The same exercise can be repeated for other sectors of the economy, e.g. construction, tourism, etc. until a composite figure (Y) is calculated for the costs imposed by the failures in an entire labour market in a given geographical territory. The costs experienced by employees in their specific relationship with their employers can then be compared against this general cost index (Y) and expressed as (X). It should be stressed that the costs of (X) will track the general index (Y), but this will not necessarily always be the case, i.e. the value of (A) to (E) in the case of a particular employment relationship may be higher or lower than (Y).

Turning to the relevance of rules and standards in this context, let's imagine that Parliament adopts a rule which is of universal application to all employers. Given its inherent precision, accessibility and determinacy of outcome, most employers in the financial services market in the UK understand the rule and adjust their practices *ex ante*<sup>96</sup> so that the rule acts directly on one or more of the variables (A) to (E), depending on the context. The end result is that (Y) will reduce in value. An illustration will suffice. If we imagine that (Y) is valued at

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<sup>96</sup> The term 'ex ante' is used here in the sense of 'prior to any legal claim'.

the figure 30 and the rule imposed provides that every employee must be given 20 days' paid annual leave, this will minimise the scope for the employer to engage in opportunistic behaviour (C) and perhaps mitigate the transaction costs (A) and informational deficits (B) experienced by the employee. Thus, most employers in the labour market will modify their behaviour *ex ante* and (Y) will lower, say to the figure of 29.8. Of course, some employers may fail to comply, but they are unlikely to be numerous. If a non-conforming employer is sued after the adjustment of (Y) from 30 to 29.8, loses the case, and then modifies their practices to comply *ex post facto*, this isolated case is unlikely to have any effect on (Y), as it involves a single employer.

We can repeat this exercise for a standard of review, but what is striking is the degree to which the outcome will likely differ. When standards are introduced into the law, the extent to which they will have a depressive impact on transaction costs (A)-(E) in the labour market will be unknown: such is their relative inaccessibility, open-textured nature and indeterminacy of outcome. Seen from this perspective, at their inception, the scope for employers to change their behaviour *ex ante* on the coming into force of standards of review is attenuated at best, or negligible at worse. Instead, the standard's direction of attention is oriented naturally towards the regulation of the behaviour of specific employers in a particular context, which is an exercise that will be deferred *ex post facto* to a court or tribunal. The self-oscillating nature of standards of review such as the range of reasonable responses, proportionality and good faith standards underscores this point, in the sense that the extent of their regulatory impact cannot be quantified very easily in the abstract *ex ante*. In contrast with rules, the rigour of their application may be more or less acute *ex post facto* in any given case of adjudication. For example, an employee  $\Omega$  working for an employer  $\theta$  in

the financial services labour market may labour under specific vulnerabilities, such as democratic deficits (F), economic dependency in terms of an inability to spread his risks (G) and social and psychological reliance on the job (H). In this event, although the value of (Y) is 30 generally in the labour market in financial services, the total costs (X) experienced by the employee  $\Omega$  (to recap, the value of (A) to (E) in the specific case of  $\Omega$  and  $\theta$ , and as such (X), may track, or be higher or lower than (Y)) will be higher than (Y) valued at 30, e.g. say  $\theta$ 's (X) is the figure of 34. If employee  $\Omega$  raises legal proceedings in a court or tribunal which invokes an employment right entailing the application of a standard of review and succeeds *ex post facto* in her legal claim, we can envisage that standard functioning in a unique way on  $\theta$  to suppress the value of (X) *ex post facto*. For example, employee  $\Omega$  succeeds in her claim and (X) falls to the value of 31 owing to an accompanying suppression of democratic deficits (F), economic dependency (G) and social and psychological reliance (H) on that particular relationship. Of course, (X) nevertheless remains higher than the value of (Y) which is 30. But, the nub of the matter is that notwithstanding the reduction in (X), of itself, this is unlikely to have any mitigating effect on (Y). It is only  $\theta$  that the standard of review has impacted upon. There will be no effect on the structural and systemic labour market imperfections:  $\Omega$ 's achievement in changing  $\theta$ 's behaviour is a drop in the ocean in comparison with the entire financial services labour market. Even in the face of  $\Omega$ 's victory and the provision of court guidance on the features and operation of the standard of review in that case, other employers will nonetheless be cautious in adjusting their conduct to account for the standard of review. It will only be where the stage is reached that the court's jurisprudence on the functioning of the standard of review achieves such a degree of clarity that it is finally transformed into a rule and employers across the industry respond accordingly to change their behaviour. At that point, (Y) will adjust in a downwards direction.

## ***6. Significance of the observation that standards of review are 'relational-specific'***

There are four significant points which emerge from the fundamental observation that self-modulating standards such as range of reasonable responses, proportionality and good faith (i) act directly on certain vulnerabilities and dependencies that are particular to employees in their own employment relationships and consequently (ii) confer a licence on employees to demand disparate and preferential treatment in certain circumstances. Two of them operate at the level of the justificatory criteria for labour law as a discipline, whilst two function at a less abstract level.

### ***A. Universal and Selective Justifications for Labour Law***

The first implication of the principal point made in this article lies in the light it can shed on the utility of *universal* justifications for labour law, i.e. theoretical justifications for the discipline that include pluralist concerns, such as the rights of the public, consumers, economic efficiency by regulating the labour market, etc. Take the 'law of the labour market' account as one illustration. If it is accepted that labour law norms in the form of standards of review as a matter of theory serve to – and ought to serve to – tackle the scope of, and opportunity for, special employee vulnerabilities to arise in the context of employment relationships or to control certain workplace practices or circumstances where the potential for harm to be done to employees is great, then we can chip away at the some of the strength associated with the claim that this branch of the law functions, and ought to function, to promote societal, public, political and economic interests in utility and welfare that are much broader than those of workers alone. This argument, of course, also requires us to distinguish the *actual* function that labour law performs from its *proclaimed* or *intended* function of

‘labour market regulation’ that has been articulated by successive UK governments,<sup>97</sup> and it is the former with which we are concerned in this context. But how do we get from the point that labour law in actual fact performs a relational-particular regulatory role to the proposition that this calls into question the normative claims of universal theories? Are we not making the fundamental error of taking a descriptive proposition – to the effect that the properties of standards of review demonstrate that labour law, in theoretical terms, operates to regulate something more than general market failures – to make a normative claim that universalism may be suspect? No, because our claim is prescriptive as well as descriptive, which can thus justify the separate normative claim that the purchase of universalism rests on shaky grounds.<sup>98</sup>

If it is accepted that claims in favour of a universal justification have been shorn to some degree by this argument, then it may be warranted to advance more selective goals for labour law regulation<sup>99</sup> that further such narrower sectional concerns. If we recognise that a greater intensity of review of management conduct or decisions that are associated with a standard of review – such as the proportionality or range of reasonable responses standards – is justified where the fundamental or human rights of a worker are at stake (as opposed to

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<sup>97</sup> Hugh Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 ILJ 17, 34-37 and *Good Work* (n 54) 104.

<sup>98</sup> For the other weaknesses associated with universal theories, see Davidov (n 1) 70-71 and Eric Tucker, ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?’ (2010) 39 ILJ 99.

<sup>99</sup> See Guy Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 OJLS 543.

his/her economic or political interests), then the commercial freedoms of the employer and the wider efficiency gains connected with the exercise of such freedoms must give way. Once again, here we can see that labour law restrains the economic prerogatives of the public, commerce and wider society.

The relationship between standards of review and case by case factors also offers up useful insights into some of the variables that any general justification for labour law – descriptively and normatively – ought to take into account. Any search for a univocal justificatory theory for the discipline<sup>100</sup> – insofar as that is an achievable objective<sup>101</sup> – must factor in the relational and contextual nature and role of standards of review. For that reason, theoretical explanations of labour law that are based on notions such as individual subordination and dependency,<sup>102</sup> personal capabilities<sup>103</sup> and relational-particular

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<sup>100</sup> Some of the reservations associated with quests for the discovery of an abstract justification for a discipline are versed in Brian Bix, ‘The Promise and Problems of Universal, General Theories of Contract Law’ (2017) 30 Ratio Juris 391.

<sup>101</sup> The author is agnostic as to the possibility of ever being able to identify a general justificatory theory for labour law.

<sup>102</sup> Davidov (n 1) 35 ff.

<sup>103</sup> Deakin and Wilkinson, *The Law of the Labour Market* (n 66) 290-303; Brian Langille, *The Capability Approach to Labour Law* (OUP 2019), Brian Langille, ‘Labour Law’s Theory of Justice’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP, 2011) 111-119; Brian Langille, ‘Take These Chains From My Heart and Set Me Free’: How Labor Law Theory Drives Segmentation of Workers’ Rights’ (2015) 36 Comparative Labor Law & Policy Journal 257; Riccardo Del Punta, ‘Labour Law and the Capability Approach’ (2016) 32 IJCLIR 383;

domination<sup>104</sup> hold a greater degree of promise as descriptive and normative accounts of the field, since their internal grammar and constituent variables are nuanced enough to cater for the sensitivities of the diverse range of employment relationships, including the variety of contexts and environments within which such relationships can operate. This can be used to distinguish them from more structural-based justifications for the subject, which instead prefer an account stressing its fundamental role in breaking down market-generated inequalities.

### *B. Other Insights*

The role of standards of review set out in this paper casts doubt on the concerns raised by some commentators about the divergent intensities of scrutiny associated with each of the standards identified in labour law.<sup>105</sup> As noted in section 3, the principal concern with a hierarchy of scrutiny of standards of review is that they can give rise to confusion on the part of management, employees and courts. This is particularly germane where differing standards

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Mark Freedland and Nicola Kountouris *The Legal Construction of Personal Work Relations* (OUP 2011) 377-379; and Alan Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in Alan Bogg, Cathryn Costello, Anne CL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 86-97.

<sup>104</sup> Cabrelli and Zahn, 'Theories of Domination and Labour Law' (n 48) and Cabrelli and Zahn, 'Civic Republican Political Theory and Labour Law' (n 48).

<sup>105</sup> Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (n 2) and Alon-Shenker and Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (n 27) 422.



are invoked in the same claim by an employee.<sup>106</sup> Likewise, there is a fear that the very existence of such differing standards betrays an overall degree of incoherence in the law, as well as an anxiety over the inconsistent handling of the standards by the judiciary (e.g. the unjustifiable exchange of a fixed for floating (or vice versa) standard, or the conflation of standards). However, seen in the light of the propositions and perspective advanced in this article, this concern can be dispelled as the case for divergent concentrations of review is arguably a strong one. Whilst there may be some indeterminacy of outcome in their application, the disadvantages are outweighed by the positives associated with tailored regulation. Moreover, as acknowledged by Davidov, when coupled with rules, standards of review in labour law can be concretized into harder patterns on an incremental casuistic basis, giving rise to substantive illustrations and guidance over time.<sup>107</sup>

An additional insight that can be drawn from the preceding discussion is that it provides a justification for the proposition that not all labour laws are, or ought to be, concerned with the equal treatment of workers, i.e. formal equality.<sup>108</sup> Whilst rules of labour law secure consistency of treatment of workers across the board irrespective of any disparate adverse impact they might have suffered, standards of review secure a measure of substantive equality by sanctioning redistributive arrangements that tailor outcomes to the individual contexts of workers. If we peer at this claim from the particular angle of

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<sup>106</sup> See Barmes (n 4) 133-137, 168 and 248.

<sup>107</sup> Davidov (n 1) 192-195 and Alon-Shenker and Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (n 27) 411-412.

<sup>108</sup> See *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728, 757B (Baroness Hale) for a definition of 'formal equality'.

employment equality/discrimination law, this is perhaps unsurprising since such laws purport to protect the dignity and fundamental rights of individuals. However, when examined from the perspective of traditional labour laws such as unfair dismissal, redundancy, protection of employees on the transfer of their employers' businesses, maternity leave, etc., this point is much more insightful. It suggests that labour laws configured around a parity of treatment model may be insufficient at best, or inadequate at worst. For example, statutory norms regulating part-time work, fixed-term work and agency work in the European Union adopt the equal treatment model of protection whereby such workers must not be treated any less favourably than permanent, full-time workers who are directly employed. If labour law is a story about achieving something more than simple parity in worker treatment, then an argument can be made that enhanced protection for workers in certain contexts is warranted via legal measures such as standards of review that are particularly attuned to securing preferential outcomes.

## **7. Conclusion**

This article explores how standards of review act directly on certain individual factors that are particular to employment relationships. It makes the point that the actual and normative function of labour laws is to achieve something much more than general labour market regulation. Reflecting on the academic literature that discusses the hallmarks of standards of review in the abstract, Davidov versed the following four special features: 'flexibility', 'adaptability to change', 'altruistic potential' and 'anti-avoidance'. This article makes the case for a fifth attribute, namely the '*relational-particular*' nature of standards of review. As a characteristic, it is especially useful in an instrumental branch of the law concerned with the vindication of social rights such as labour law, insofar as it provides a degree of legitimization

for the preferential treatment of certain workers over others in specific workplace contexts where this is justified. Indeed, this relational-particular feature teaches us that the claims made in favour of universal theories of labour law may lack a degree of purchase. Moreover, the evidence for 'relational-particular' employment laws pushes back against two powerful descriptive and normative claims: first, that labour laws are only – and ought only to be – concerned with ensuring the maintenance of a properly functioning and efficient labour market by eliminating or minimising general failures in that market; and secondly, that labour laws that attempt to go beyond this market-correcting role are misconceived and unwarranted insofar as they impose costs on business, leading to inefficiency in the productive economy and a net reduction in overall societal welfare.

## ANNEX – TABLE 1

Standard of Review	Intensity	Fixed <sup>109</sup> or Fluctuating? <sup>110</sup>
Proportionality	<p><b>Very high</b> - The degree of intrusion associated with the proportionality standard is protean and depends on a number of variables, including the relative strength of the legitimate aims of the employer, the extent to which the challenged managerial policy or practice is appropriate and necessary to achieve that legitimate aim, or whether a less restrictive alternative could have been adopted, as well as the concomitant harm suffered by the employee.</p>	<p><b>Fluctuating</b> - having established a rational connection between the managerial policy and the employer's legitimate aim and that a less drastic means of achieving that aim was not available to the employer, an adjudicator must evaluate the harm done to the claimant employee and balance that against the requirements of the defendant employer to apply the policy to achieve the aim.<sup>111</sup> Thus, in each case, the greater the harm caused to the employee, the more intense the court's scrutiny will be. Generally, reflecting its public law origins, where fundamental and human rights are at stake, the proportionality standard will dictate that the employer's justification for the</p>

<sup>109</sup> In the sense that a single and unwavering identifiable threshold for employer liability applies in all cases, admitting of no self-modulation pursuant to fact-specific factors.

<sup>110</sup> In the sense that the intensity of review is context-dependent on either the position of the employer or employee, or both of them.

<sup>111</sup> *Barry v Midland Bank plc* [1999] 3 All ER 974 (HL) 984h–j (Lord Nicholls) and *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, 3246B–3251E (Mummery LJ).

		policy or practice must be extremely pressing. <sup>112</sup> Therefore, proportionality is an illustration of a legal concept where the particularities of, and impact on, the employee is taken into account to dictate the liability or non-liability of the employer.
<b>Good Faith</b>	<b>High</b> – the court will adopt an objective test to evaluate whether the employer’s conduct has destroyed or severely undermined the employee’s trust and confidence in the employment relationship.	<b>Fluctuating</b> - the good faith standard applied pursuant to the implied term of mutual trust and confidence is also self-modulating inasmuch as the depth of its ‘bite’ will vary according to the employment relationship concerned, e.g. the ‘legitimate expectations’ and ‘reasonable notice’ strands of the good faith standard discussed at section 3 (B) above.
<b>Range of Reasonable Responses</b>	<b>Low</b> – an adjudicator will determine whether the employer’s decision to dismiss fell within the band of responses that would be conceivably adopted by reasonable employers.	<b>Fluctuating</b> - the following criteria will be taken into account pursuant to the range standard: whether the employer is small or large in size, whether the employer has access to a broad or limited range of financial, administrative and other resources, whether the employer is situated in the public or private sector, whether it recognises a trade union or does not: see section 98(4)(a) of the ERA. Although the range test is self-modulating in terms of the intensity of review of managerial conduct, unlike the proportionality standard, it is one-dimensional in its focus, since it generally ignores the effect of the employer’s

<sup>112</sup> Cabrelli, ‘The Hierarchy of Differing Behavioural Standards of Review in Labour Law’ (n 2) 149 and Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 163-164 and 195-196.

		decision to dismiss on the employee and instead concentrates on the practices of the employer and reasonable employers generally. <sup>113</sup>
<b>Rationality</b>	<b>Very Low</b> – the test is whether the employer can point to even at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, in which case the employee claimant will fail to discharge the rationality standard of review.	<b>Fixed</b> – the rationality standard entails the application of a fixed level of scrutiny in the sense that either there is at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, or there is not. As such, the application of the rationality standard will point to a single and unwavering identifiable threshold for employer liability.

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<sup>113</sup> However, where the consequences of a dismissal are severe for the employee, e.g. where it has or is likely to result in the employee being disbarred or disqualified from practising a profession, the range standard is sufficiently flexible to accommodate a two-dimensional approach to enjoin adjudicators to take into account the added dimension of the gravity of the implications of a dismissal. For example, see *Moncrieffe v London Underground Ltd.* [2017] UKEAT/0235/16/DA, *A v B* [2002] EAT/1167/01 ST, [2003] IRLR 405, *Salford Royal NHS Foundation Trust v Roldan* [2010] EWCA Civ 522, [2010] IRLR 721 and *Turner v East Midland Trains Ltd.* [2012] EWCA Civ 1470, [2013] ICR 525, 541C-F (Elias LJ) where it was decided that the severity of the harm to, and severe consequences for, the employee may be taken into account in deciding whether the decision to dismiss fell within the range of reasonable responses.